FILE COPY

Supreme Court [illegible]

October Term, [illegible]

Nos. 198, 199

Michigan-Wisconsin Pipe Line Company, [illegible]

v.

Robert S. Calvert, Comptroller of Public [illegible] et al., *Appellees*

Nos. 200, 201

Panhandle Eastern Pipe Line Company, [illegible]

v.

Robert S. Calvert, Comptroller of Public [illegible] et al., *Appellees*

APPEALS BY EACH APPELLANT FROM BOTH THE [illegible] OF TEXAS AND THE COURT OF CIVIL APPEALS [illegible] THIRD SUPREME JUDICIAL DISTRICT OF [illegible]

REPLY BRIEF FOR APPELLANTS

Arthur R. Seder, Jr.
Everett L. Looney
R. Dean Moorhead
D. H. Culton
S. A. L. Morgan
Counsel for Appellant Michigan-Wisconsin Pipe Line Company

E. H. Lange [illegible]
Gene M. W[illegible]
Chas. I. F[illegible]
Everett L. [illegible]
R. Dean [illegible]
D. H. Cu[illegible]
Couns[illegible] Panhandle [illegible] Pipe [illegible]

Press of Byron S. Adams, Washington, D. C.

BLEED THROUGH- POOR COPY

INDEX

CASES CITED

STATUTES CITED

Supreme Court of the United States

October Term, 1953

Nos. 198, 199

Michigan-Wisconsin Pipe Line Company, *Appellant*

v.

Robert S. Calvert, Comptroller of Public Accounts, et al., *Appellees*

Nos. 200, 201

Panhandle Eastern Pipe Line Company, *Appellant*

v.

Robert S. Calvert, Comptroller of Public Accounts, et al., *Appellees*

APPEALS BY EACH APPELLANT FROM BOTH THE SUPREME COURT OF TEXAS AND THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

REPLY BRIEF FOR APPELLANTS

I.

APPELLANTS HAVE PROPERLY CHALLENGED THE VALIDITY OF THE TAX, AS TESTED BY THE COMMERCE CLAUSE

As Appellants had suggested, this Court reserved the question of its jurisdiction on appeal. Obviously, since appeals were taken from two different state courts,

the appeals from one of these courts must be dismissed. This question was discussed by appellants at pages 58-61 of their opening brief. The Attorney General of Texas has not seen fit to advise the Court of his views with respect to this important procedural question. Instead, appellees argue, under a heading entitled "Jurisdictional Question" (Appellees' Brief, pp. 7-13) that the validity of the gathering tax statute was not properly raised in appellants' protests and pleadings in the state court.

This is indeed a surprising contention. If applicable now, it would have been equally applicable in the courts below and in Appellees' Motion to Dismiss or Affirm filed in this Court. Yet the argument has never before been made or even suggested. Moreover, the District Court specifically recognized the adequacy of the protest and pleadings to raise the Commerce Clause question by holding the tax invalid on that very ground, as applied to appellants' activities.

The Court of Civil Appeals also expressly recognized that the question as to the validity of the Act as tested by the Commerce Clause had been sufficiently raised. It said:

> "The single question presented for our decision is whether Article 7057f, a revenue statute, the pertinent portions of which are set out below, as applied to the business activities of appellees, violates the Commerce Clause of the Constitution of the United States. If so it is void, if not it is valid." (R. 35-37)

The entire opinion was thus written in recognition of the fact that the federal question had been properly raised and preserved. This Court will accept the recognition by the state courts that the constitutional question has been properly raised. When the validity of a statute has been considered and decided by the state courts, this Court will not inquire when and how the validity was challenged. *Charleston F.S. & L. Assn.* v. *Alderson,* 324 U. S. 182, 185-186 (1945).

The only criticism by appellees of the protests is that such protests do not contain an express allegation that the

tax is an "undue" burden on interstate commerce, that it is discriminatory against interstate commerce, or that it subjects interstate commerce to the risk of "multiple burdens." Thus, in fact, appellees do not claim that the validity of the tax under the Commerce Clause was not raised below, but rather that all of the arguments that could have been advanced by appellants were not set forth in detail in the formal protests and pleadings. The Court will observe from a cursory examination of these documents (R. 1, 7, 11, 23) that the issue of the validity of the tax under the Commerce Clause was raised in great and perhaps unnecessary detail. Texas courts do not require that a protest set forth the arguments in support thereof. *James* v. *Consolidated Steel Corp.* (Ct. Civ. Appeals) 195 S. W. 2d 955, 962 (1946). To contend that appellants are now foreclosed from advancing certain arguments in support of their contentions—that is, from pointing out to the Court the effect upon interstate commerce of the tax here in question—because not specifically spelled out in their protests and pleadings is absurd.

II.

APPELLEES' "CONTROLLING PRINCIPLE"

At page 17 of appellees' brief it is stated, under the heading "Controlling Principle":

> "Although a person is engaged solely in interstate commerce, a state may validly levy a non-discriminatory tax upon a local incident or activity of the interstate business, which is separate and apart from the actual flow of commerce, provided the taxpayer is receiving from the state levying the tax, benefits, protection or opportunities which bear a fiscal relationship to the tax."

As appellants stated in their opening brief (p. 47), they "have no quarrel with this statement as an abstract principle." The Court will immediately recognize, however, that the statement comprehends two separate and distinct elements, one relating to the validity of a statute under the

Commerce Clause and the other to its validity under the Due Process Clause. Cf. *Ott* v. *Mississippi Valley Barge Line Co.,* 336 U. S. 169, 174 (1949). Appellants have raised no question concerning the validity of the gathering tax statute under the Due Process Clause; thus the proviso in the above quotation is wholly irrelevant to the decision in these appeals.

Despite this fact appellees devote much the greater portion of their argument to the academic question whether appellants received "benefits, protection and opportunities" from the State of Texas. With respect to the only issue actually involved—that arising under the Commerce Clause—appellees now give lip service to the principle that the receiving of gas by appellants into their pipelines for immediate transmission to other states cannot be taxed unless such taking is a local incident separate and apart from commerce; but they gloss over the question whether such taking *is* a local incident—indeed, they assume that it is such an incident. Appellees have thus resorted to the familiar ruse of setting up a straw man and then attempting to strike it down in an effort to lead the Court away from the decisive point presented by the record.

III.

THE CASES CITED BY APPELLEES DO NOT SUPPORT THEIR POSITION ON THE DECISIVE QUESTION

In their opening brief appellants demonstrated that a tax laid on the privilege of taking gas into their pipelines for immediate transportation in interstate commerce is not a tax on a local incident separate and apart from the commerce itself. They feel that it is not necessary to repeat such argument here.

In the few pages (beginning on page 25) of their brief dealing with this subject, appellees utterly fail to show how the taking or receiving of gas for immediate interstate transportation can be carved out of the economic process of transportation itself. Instead, they cite and apparently rely upon cases involving widely different fact situations,

having no relation to the facts here involved or the validity of the tax under consideration. Thus, *Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172 (1923), involved a severance tax laid upon the mining of iron ore and other minerals. In sustaining the tax this Court simply reaffirmed the well-established distinction between the traditional local activity of severing minerals from the earth and their subsequent interstate transportation. The tax was purely a severance tax on the mining operation, not, as here, a tax on a carrier for the privilege of receiving mineral products for immediate interstate transportation.[1] *Chassanoil* v. *Greenwood,* 291 U. S. 584 (1934), involved an occupation tax levied upon those engaged in the buying and selling of cotton within the state. The tax was not levied upon an interstate purchaser or upon the carrier for the privilege of loading the cotton on interstate transportation facilities. The Court simply held that these steps in *preparation* for subsequent sale and shipment were local in nature.

Appellees also cite but do not discuss *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33 (1940); *International Harvester Co.* v. *Dept. of Treasury,* 322 U. S. 340 (1944); and *Dept. of Treasury* v. *Wood Preserving Corp.,* 313 U. S. 62 (1941). None of these cases is applicable to the question here for the reasons stated by this Court in *Joseph* v. *Carter & Weekes Stevedoring Co.,* 330 U. S. 422 (1947). In none of the cases cited by appellees did this Court intimate that an act which is an essential and indispensable part of the transportation process, such as taking possession of a commodity for immediate interstate transportation, is a local activity which can be taxed by the state—one in which the carrier can engage only under a right granted by the state.

---

[1] At page 28 of their brief appellees say: "The Oliver Iron Company performed the same two activities the appellants perform: the taking and the transportation of a natural resource to fill existing contracts with consumers without the State." This statement is wholly without foundation. The Oliver Iron Company did not take possession of ore for transportation, nor did it transport the ore.

IV.

THE RECEIVING OF A COMMODITY FOR TRANSPORTATION CAN NOT BE CARVED OUT OF THE TRANSPORTATION PROCESS ITSELF

At pages 38 and 39 of their brief appellees seek to distinguish the so-called "stevedoring cases," *Puget Sound Stevedoring Co.* v. *Tax Commission,* 302 U. S. 90 (1937), and *Joseph* v. *Carter & Weekes Stevedoring Co.,* 330 U. S. 422 (1947), the cases most nearly in point on the facts.[2]

The alleged distinction advanced by appellees is that the stevedores "not only took possession of the goods but actually transported the goods between the dock and the hold of the ships and that such transportation in reality constituted the first or last leg of an interstate journey." (Appellees' Brief, p. 39). If that analysis is accepted, the present cases clearly present *a fortiori* situations for the invalidity of the tax. Appellants would stand in the position, not of the stevedores, but of the ship—the recipient of the goods. Moreover, Phillips Petroleum Company, which transports the gas 300 yards from the outlet of its gasoline plant to the inlet of appellants' pipelines, would stand in the shoes of the stevedores. Appellees would apparently agree that, in performing that transportation function, Phillips would be protected from taxation under the Commerce Clause, yet the pipeline company—the analogical equivalent of the ship—is said not to be engaged in interstate commerce when it receives possession of the gas. Obviously, appellees' attempted distinction of the stevedoring cases is frivolous.

---

[2] In both stevedoring cases the Court cited and relied upon *Baltimore & Ohio S. W. Ry. Co.* v. *Burtch,* 263 U. S. 540 (1924), where a bystander was injured while, at the request of a railroad conductor, he was helping to unload a piece of machinery from a railroad car. In holding that this injury was covered by the Federal Employers' Liability Act, this Court said:

> "It is too plain to require discussion that the loading or unloading of an interstate shipment . . . is so closely related to interstate transportation as to be practically a part of it . . ." (263 U. S. at p. 544)

Appellees also attempt to draw a distinction between receiving a commodity for transportation and the actual transportation (in the sense of movement) itself. The short answer to that contention is to be found in this Court's holding in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203 (1885):

> "Transportation *implies* the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such *receiving* and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two States involved in such transportation." (Emphasis supplied.)

V.

APPELLEES' "BENEFITS, PROTECTION AND OPPORTUNITIES" ARGUMENT

Notwithstanding the lack of relevance of alleged "benefits, protection and opportunities" afforded the pipeline companies by the conservation and proration laws and regulations of Texas to the real issue in this case, appellees devote the greater portion of their brief to that subject. They attempt to support their claims, not by anything shown on the face of the conservation laws or anything in the history of the legislation, but solely on certain theories expounded by one of the members of the Texas Railroad Commission. The witness did not purport to base his theories on official action of the Commission or upon personal knowledge of legislative intent. He merely expressed his own personal conclusions in response to obviously leading and suggestive questions propounded on behalf of appellees. See, e.g., R. 142. That these theories are wholly lacking in substance is fully shown at pages 50-55 of appellants' opening brief.

VI.

THE TAX IS NOT SUPPORTED BY APPELLEES' ARGUMENT THAT "INTERSTATE COMMERCE SHOULD PAY ITS WAY"

In the conclusion of their brief (p. 47), appellees make the familiar argument that the interstate business of the pipeline companies should be made to "pay its way" through enforcement of this tax. Appellees overlook the fact that, as stated in *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 608 (1951):

> " . . . the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so."[3]

Moreover, the record shows that appellants' interstate business already fully "pays its way." The State of Texas has imposed a production tax of 5.72 per cent of the value at the well of every cubic foot of gas which appellants transport through their pipelines. (V.A.C.S., Art. 7047b) This tax is paid by the pipelines either directly as producers or indirectly as a part of the price paid for gas purchased from others (R. 85, 113). Likewise, the State levies a special tax to cover the costs incurred by the Railroad Commission and the Attorney General in enforcing the conservation and proration laws and other activities of the Commission (V.A.C.S., Arts. 6032, 6066). This tax not only pays all of the so-called "burdensome expenses" (see Appellees' Brief, p. 2) which the State incurs in administering its conservation and proration laws but leaves, in addition, an annual surplus of over one million dollars, which is transferred to the State General Revenue Fund (R. 240-241).

Moreover, each appellant pays the State of Texas an ad valorem tax on the value of all of its facilities and leases within the State (R. 85, 113). Hence a tax has been paid

---

[3] See also *Freeman* v. *Hewit*, 329 U. S. 249, 256 (1946).

the State with respect to every cubic foot of gas which appellants transport in their pipelines, and an additional tax has been paid with respect to every inch of pipeline and all other properties and facilities owned by appellants within the State.

It should be reiterated that the "gathering tax" here involved was not imposed to recoup costs of regulating, inspecting or policing appellants' activities. The State incurs no expenses of that character. Appellees frankly stated in their Motion to Advance filed in this Court that if the tax is held valid a special session of the Legislature will be called to dispose of the tax moneys by appropriations to increase teachers' and public employees' salaries, finance the Texas eleemosynary institutions and provide a program of drought relief. But, however laudable those expenditures may be, this burden may not be shifted to "the consumers of thirty-eight other states" (Appellees' Brief, p. 34) through a tax on the privilege of engaging in interstate commerce. See *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1, 35, 37 (1910).

CONCLUSION

For the reasons stated, the judgments of the court below should be reversed and those of the District Court affirmed.

Respectfully submitted,

ARTHUR R. SEDER, JR.
S. A. L. MORGAN

Counsel for Appellant Michigan-Wisconsin Pipe Line Company

E. H. LANGE
GENE M. WOODFIN
CHAS. I. FRANCIS

Counsel for Appellant Panhandle Eastern Pipe Line Company

EVERETT L. LOONEY
R. DEAN MOORHEAD
D. H. CULTON

Counsel for Both Appellants

SIDLEY, AUSTIN, BURGESS & SMITH
VINSON, ELKINS, WEEMS & SEARLS
LOONEY, CLARK & MOORHEAD
CULTON, MORGAN, BRITAIN & WHITE

Of Counsel